UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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| TESLA, INC.,<br><br>Respondent,<br><br>and<br><br>MICHAEL SANCHEZ, an individual, JONATHAN GALESCU, an individual, RICHARD ORTIZ, an individual, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, a labor organization,<br><br>Charging Parties. | Case Nos. 32-CA-197020<br>32-CA-197058<br>32-CA-197091<br>32-CA-197197<br>32-CA-200530<br>32-CA-208614<br>32-CA-210879<br>32-CA-220777 |

**ANSWERING BRIEF OF CHARGING PARTIES MICHAEL SANCHEZ, JONATHAN GALESCU, RICHARD ORTIZ, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO**

SCHWARTZ, STEINSAPIR, DOHRMANN & SOMMERS LLP
MARGO A. FEINBERG
DANIEL E. CURRY
6300 Wilshire Boulevard, Suite 2000
Los Angeles, California 90048-5268
Telephone: (323) 655-4700
Attorneys for Charging Parties MICHAEL SANCHEZ, JONATHAN GALESCU, RICHARD ORTIZ, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO

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### STATUTES

# I

## PRELIMINARY STATEMENT

The National Labor Relations Act provides employees with the right to form, join, or assist a labor organization and to engage in other concerted activities for the purpose of mutual aid or protection and prohibits employers from interfering, restraining, or coercing employees in the exercise of these rights. ALJ Amita Tracy's precise and well-reasoned September 27, 2019 decision relies on this bedrock rule to find that Respondent Tesla, Inc. repeatedly violated the NLRA.

Respondent might be a novel car company, but when it comes to its NLRA violations, it is decidedly conventional. It is also prolific. Respondent fired one of the principal Union organizers, Richard Ortiz, while disciplining another, José Moran, in direct response to their protected concerted activity. It threatened to revoke benefits if the employees unionized. It interrogated employees who publicized the Company's poor safety record and blocked employees from wearing union apparel without justification. It tried to co-opt the most active leaders, and, when that failed, disparaged the union drive as hopeless. Security guards threatened employees who handed out union flyers and supervisors issued warnings and prohibitions on union literature in the plant.

ALJ Tracy properly found that all the conduct described above violated the Act. Respondent now concedes that the last three of the acts above were unlawful. Respondent's briefing on the remaining violations repeatedly distorts and even fabricates the evidentiary record, a sign of the impotence of its arguments. The actual facts of the case, along with the numerous credibility findings ALJ Tracy made against Respondent's witnesses, overwhelmingly support the ALJ's findings of fault.

None of the violations found by the Administrative Law Judge are novel or noteworthy. As Respondent's Chief People Officer admitted, her CEO is prone to writing "dumb stuff." Much of the rest of Respondent's misconduct could be characterized similarly. ALJ Tracy's

decision finding Respondent repeatedly violated the Act should be upheld and the remedies in her decision ordered.

## II

## STATEMENT OF FACTS

### A. TESLA WORKERS LAUNCH A UNION ORGANIZING DRIVE TO IMPROVE WORKING CONDITIONS AT TESLA'S CAR MANUFACTURING PLANT IN THE SUMMER OF 2016

In the Summer of 2016, Tesla production employees working at the Respondent's electric car manufacturing facility in Fremont, California reached out to the UAW in the hope of improving their working conditions through unionization. (Tr. 47, 673-76)[1] Tesla employee José Moran[2] met with two representatives from the UAW to discuss how a union could benefit Tesla workers and help address frequent employee concerns, such as long hours, lack of safety, preventable injuries, favoritism in promotion, and inadequate compensation. (Tr. 46, 673-674; GCX 8) While Moran was proud to assemble the most innovative and environmentally friendly cars in the world, he was frustrated Respondent did not treat its employees with the same respect. (Tr. 337, 687-88; GCX 8)

Excited about an avenue to address employees' concerns, Moran created a private Facebook group called "Tesla employees for UAW Representation," where Tesla hourly employees could discuss working conditions. (Tr. 675) In August 2016, Moran invited his fellow co-workers to join him in a series of meetings that established the Volunteer Organizing Committee, or "VOC," a committee of workers at the Tesla Fremont facility who volunteer to

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[1] All references to the transcript herein are indicated by (Tr. __) All references to Joint Exhibits, General Counsel Exhibits, Respondent Exhibits and Charging Party Exhibits are indicated by (JX __), (GCX __), (RX __), and (CPX __), respectively.

[2] Moran is an hourly production associate at Tesla's Fremont facility. (Tr. 668). Employed by Tesla since 2012, Moran's current position is quality lead inspector, where he performs ultrasound testing on spot welds on the frame of the underbody in Body and White at the beginning of the car building process. (Tr. 668, 669-70).

lead the organizing effort to bring union representation to Tesla. (Tr. 47, 431-433, 676-77). Tesla Employees Richard Ortiz[3] and Michael Sanchez also joined the VOC in the Summer of 2016. (Tr. 87, 432).

## B. IN FEBRUARY OF 2017, TESLA EMPLOYEES PUBLICLY LAUNCH THE UNION CAMPAIGN AND FACE IMMEDIATE HARASSMENT FROM TESLA

Tesla hourly production employees continued to meet and speak with each other privately about bringing union representation to Tesla until February 2017, when employee José Moran took a bold step forward. (Tr. 48). On February 9, 2017, Moran posted a blog article to the website Medium.com, titled "Time for Tesla to Listen," in which he became the first Tesla employee to publicly call for a union at Tesla. (GCX 8; Tr. 48, 687-88).

In this article, Moran stated he was proud to be building the car of the future and believed in the Company's vision, but thought the Company could do better. (GCX 8). He described how preventable injuries happen too often at the plant, noting an instance a few months earlier when six of the eight members of his work team were out on medical leave. (GCX 8). He explained how mandatory overtime and 60-70 hour work weeks have left workers exhausted. (GCX 8). He also pointed out that production workers earn between $17.00 and $21.00 per hour, when the average auto worker nationally earns $25.58 an hour and a living wage in Alameda County is $28 an hour. (GCX 8).

Moran asked CEO Elon Musk to be "a champion for his employees," just as he is already a "respected champion for green energy and innovation." (GCX 8). Moran concluded his article by requesting a "productive conversation about building a fair future for all who work at Tesla." (GCX 8).

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[3] Ortiz was an hourly production associate at Tesla's Fremont facility, first as a temporary employee beginning in December 2015, then as a direct employee of Tesla from October 2016 until his termination on or around October 18, 2017. (Tr. 424-25). Before Ortiz's injury in mid-February 2017, he worked in the Closures area of Body and White 2, where he prepared components that went into building the doors, hood, and fenders of the Tesla Model X. (Tr. 426-27). He returned to this position in mid-July 2017. (Tr. 428-29).

Tesla's reaction was as swift as it was negative. On the same day that Moran published his article, Musk stated Moran "doesn't really work for us, "causing confusion among Tesla employees, and called his desire for improving working conditions through union representation "morally outrageous." (CPX 8C, GCX 59). In addition, on that same day, Respondent's security guards repeatedly attempted to prohibit Tesla employees Ortiz, Moran, and Sanchez from distributing leaflets in the plant parking lot to co-workers and attempted to eject the employees from the premises. (ALJD 15-25) The leaflet's contained Moran's article. The ALJ found this conducted violated Section 8(a)(1) of the Act, and the Respondent did not except to this finding. (ALJD 15-25)

After the launch of Moran's article, Tesla employees continued to distribute union materials to co-workers inside and outside of the plant during non-work time. (Tr. 842) In March 2017, in response to the union organizing campaign, a supervisor announced that passing out stickers, pamphlets, and leaflets that were not approved by Tesla management would now be grounds for discipline and/or termination. (Tr. 844) Respondent did not except to the Judge's finding that this conduct violated Section 8(a)(1) of the Act. (ALJD 25-27)

## C. IN APRIL AND MAY 2017, TESLA EMPLOYEES SPEAK OUT ABOUT SAFETY PROBLEMS, ONLY TO FACE MORE INTIMIDATION, HARASSMENT, AND INTERROGATIONS FROM TESLA

From the beginning of the union organizing campaign, one of the employees' major concerns was the health and safety of employees working at the Fremont facility. (Tr. 47) Employees felt that preventable workplace injuries were too common, and that Tesla wasn't listening to constructive input that could reduce repetitive stress injuries. (GCX 8)

After witnessing so many preventable injuries, Ortiz and employee Jonathan Galescu decided to request injury logs that Tesla is required by law to have, and ultimately received the information. (Tr. 846, 862, 1037, 1057) Tesla employees then distributed leaflets discussing safety problems discovered through analyzing that injury data on May 24, 2017. (Tr. 390-99) However, the employees were once again harassed by security guards and told to stop

distributing leaflets and leave the premises. (Tr. 399-411) ALJ Tracy found that Respondent's security guards attempted to prohibit distribution of the leaflets and eject the employees in violated Section 8(a)(1). (ALJD 15-25) Respondent did not except to this finding.

Later the same day, Respondent interrogated Galescu and Ortiz about what they did with the safety information they had requested from the Company. (ALJD 27-32) ALJ Tracy found that this conduct violated Section 8(a)(1). (ALJD 27-32)

## D. IN RESPONSE TO EMPLOYEE SAFETY CONCERNS, MUSK AND HIS CHIEF PEOPLE OFFICER ATTEMPT TO BLOCK EMPLOYEES FROM ADVOCATING FOR A UNION

In June 2017, Tesla employees petitioned Tesla Management directly with their safety concerns. The petition, signed by numerous employees including Ortiz and Moran, asked Tesla management to "work together" with employees for a "fair, safe, and secure workplace" so that workers would not be afraid to report injuries and other safety concerns. (GCX 27; Tr. 487, 704-05) On or about June 6, 2017, Moran and other employees delivered the petition in person to Josh Hedges, and after delivering the petition in person, Moran also e-mailed the petition to Hedges and Musk. (GCX 29; Tr. 705-07)

A day later, Moran and a co-worker were escorted to a meeting with Musk and Chief People Office Gaby Toledano. (Tr. 714, 878) At the meeting, Moran testified that he and his co-worker explained some of their safety concerns and Moran stated the employees desire to form a union in order to "to have a voice in the plant." (Tr. 417) Musk and Toledano were not receptive to Moran's request for a union; Musk responded that with a union "you don't really have a voice. The UAW is a second—like two-class system where UAW is the only one that has a voice and not the workers." (Tr. 717) Chief People Officer Toledano responded that "the majority of the workers at Tesla don't want a union" and then rhetorically asked why workers would want to pay union dues. (Tr. 717-18) Musk concluded the meeting by stating, "if these Safety Committee meetings don't work out, then we'll give you your union." (Tr. 719) The Judge correctly found that Respondent violated Section 8(a)(1) when Musk and Toledano stated that employees'

selection of a union was futile, solicited complaints, and stated employees did not want a union. (ALJD 32-40)

In a subsequent email, Toledano stated to Musk it was "super smart" to have Moran on the safety team working full time "vs work to pull in the UAW," and referred to this action as "turn[ing] adversaries into those responsible for the problem." (GCX 52). At 10:53 p.m. Musk responded "exactly." (GCX 52). The following day, Toledano sent an email discussing how Moran and Ortiz were "pro-union," and that "if they join the Safety team then they would then be considered part of management and not eligible to advocate for a union." (GCX 52-001; Tr. 912, 919).

In August 2017, Homer Hunt, a supervisor of quality control at Tesla, told an employee that "The union's never getting in here. This is Tesla." (Tr. 238) ALJ Tracy found this conduct violated Section 8(a)(1) of the Act, and Respondent has not excepted to this finding. (ALJD 49-51)

## E. AFTER INCREASING NUMBERS OF TESLA EMPLOYEES BEGIN WEARING UAW T-SHIRTS TO WORK, TESLA STARTS ENFORCING A RESTRICTIVE UNIFORM POLICY

As part of the Union organizing campaign, Tesla employees, including Ortiz, distributed over 400 UAW T-shirts to their fellow employees. (Tr. 50, 187, 534) These black cotton T-shirts had a small union insignia on the front and a larger insignia that included "UAW" in large print on the back. (Tr. 181, GCX 25, 34) Numerous Tesla employees, including Ortiz and Moran, wore the UAW T-shirts while working at the Fremont facility. (Tr. 181, 224, 260, 368, 534, 759)

Tesla responded in August 2017 by beginning to enforce a uniform policy that prohibited employees from wearing UAW shirts in General Assembly, a department containing approximately 3,000 employees. (Tr. 184-85, 293, 297-98, 325, 330, 1116, 2545, 2553; GCX 73) This policy, dubbed "Team Wear," required employees to wear Tesla-issued shirts and pants while working. (Tr. 1370; GCX 41, 92) Employees out of compliance with this Team Wear policy could receive a coaching or be sent home, losing a day of pay. (Tr. 184, 297-98, 330,

1397) ALJ Tracy found that Respondent violated Section 8(a)(1) by maintaining an unlawful uniform policy. (ALJD 40-48)

## F. RESPONDENT TERMINATES ORTIZ AND DISCIPLINES MORAN BECAUSE THEY TOOK ACTIONS TO SUPPORT BETTER WORKING CONDITIONS AT TESLA

### 1. Tesla Responds to Ortiz's Legislative Advocacy

In the summer of 2017, Ortiz along with other pro-union Tesla employees met with California legislators to encourage the passage of a bill requiring recipients of the state's electric vehicle rebate, such as Tesla, to be "fair and responsible in the treatment of their workers." (ALJD 51-52; Tr. 491-495, 615-16, 723; GCX 46) In response, Toledano instructed Hedges to recruit workers to provide "positive" employee experiences at Tesla. (ALJD 54; Tr. 1181-82, 1212) Hedges recruited three employees—Travis Pratt, Shaun Ives, and Jean Osbual—to go on work time to the State Capitol in Sacramento and give public testimony in opposition to the pending bill during two state legislative hearings on September 13 and 14, 2017. (ALJD 52; Tr. 1180-81, 1210-12) At the public hearings, Pratt identified himself by name, testified to his initial and current positions at Tesla, and stated his gross income was $130,000. (ALJD 52; CPX 10)

On September 14, 2017, Tesla employee Richard Ortiz received video links to view Pratt, Ives, and Osbual's public testimony opposing the union-sponsored bills. (ALJD 52; Tr. 495-97, 618; CPX9; CPX10). After Ortiz was unable to open the videos, he sent a text message to Moran asking for assistance confirming whether the individuals testifying against the union-sponsored bill were, in fact, Tesla employees. (ALJD 52; GCX 43-001; Tr. 14-17, 498, 723).

Moran watched the video, noted the individuals' names, and looked up the individuals' company profiles to determine if they were actual Tesla employees. (ALJD 52; Tr. 723-24). At that time, an employee's company profile was accessible for any Tesla employee to view by logging into a program called Workday and typing the individual's name into the search box. (ALJD 52; Tr. 724). The profiles contained only the employee's name, picture, and job title. (ALJD 53; GCX 28). Moran had previously used Workday to compare his seniority with other

employees and had never been told of any policies or limitations on using the employee profiles feature in Workday. (ALJD 52; Tr. 672, 724-725). The ALJ also credited similar, undisputed testimony from other Tesla employees. (ALJD 52). Moran then took a screenshot of the Workday profiles of Pratt, Ives, and Osbual, which contained only each individual's name, picture, and job title, and sent the screenshots to Ortiz. (ALJD 53; Tr. 505-507; GCX 43).

Ortiz then posted the screenshots of Pratt and Ives on a private Facebook group, which was limited to rank-and-file employees of Tesla, along with a statement complaining that these individuals were lying in Sacramento about working conditions at Tesla. (GCX 28; Tr. 508, 514-15). Ortiz's post did not contain any information that the employees did not share publicly at the state hearing. (ALJD 66; CPX 9; CPX 10). A short time later Ortiz removed the post after receiving a message from Pratt telling him that it was not a "good way to start [communications]." (ALJD 53; Tr. 515-16; GCX 80).

**2. Josh Hedges Directs Employee Relations to Investigate Ortiz**

Pratt then sent a text message to Hedges with a screenshot of the Facebook post and the message, "[l]ooks like we got under some people's skin," followed by a smiley face emoji. (ALJD 53, GCX 28; Tr. 1215-1216) After Hedges asked whether the posting was on Facebook, Pratt replied, "Yea lol" [laugh out loud]. (ALJD 52; GCX 28; Tr. 1215-1216, 1218) ALJ Tracy did not find Hedges to be a credible witness, and therefore Tesla did not establish that Pratt made any complaint of targeting or harassment. (ALJD 55) Based on the credited evidence in the record, ALJ Tracy found that Pratt's written comments do not reflect a concern of harassment. (ALJD 55, 66)

Hedges then spoke with Tesla Employee Relations investigator Ricky Gecewich and directed him to begin an investigation. (ALJD 54-55; Tr. 1893-09) ALJ Tracy did not credit Hedges' testimony denying he directed Gecewich to open an investigation, because, among other reasons, Gecewich testified that Hedges did just that. (ALJD 55)

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### 3. Employee Relations Investigator Gecewich Conducts His Investigation

Gecewich began his investigation by contacting Pratt via telephone on September 19, 2017. (ALJD 56; GCX 63). Gecewich's contemporaneous notes taken during this call do not reflect any concern from Pratt about the use of his name, picture, or salary information in the posting. (GCX 63). Gecewich did not ask Pratt what he meant by the comment to Hedges, "Looks like we got under some people's skin" with a smiley face emoji. (ALJD 56; Tr. 1868-1869). Pratt told Gecewich that he was contacted by Hedges to go to Sacramento, but Gecewich did not ask Pratt whether he had shared his job title and salary publicly. (ALJD 55-56; Tr. 1808-1809). ALJ Tracy found Gecewich to be an unreliable witness. (ALJD 56)

Gecewich then interviewed Bryan Kostich, the Tesla employee who had alerted Pratt to the Facebook posting. (ALJD 56) Gecewich learned that the page where Ortiz made the posting was a private Facebook group called "Tesla Employees for Union Access," however Gecewich did not investigate this website or its privacy settings. (ALJD 56) Gecewich did not ask Pratt or Kostich about their own use of Workday. (ALJD 56) Despite having notice that the posting was related to the union organizing campaign at Tesla, Gecewich proceeded with his investigation.[4]

On September 21, 2017, Gecewich interviewed Ortiz and showed him a screenshot of the Facebook posting. (ALJD 57; GCX 28; Tr. 517-18). Ortiz apologized for his posting and recalled how he removed the post within 2 hours because he recognized it bothered Pratt. (ALJD 57; Tr. 518; 645).

Gecewich ignored this apology and removal of the post, and instead focused on questioning Ortiz about whether he took the screenshots himself and, if not, from whom he had received the screenshots. (ALJD 57; Tr. 521, 532) At this point, Ortiz assumed he was "*already*

[4] Respondent's reference to a situation at an unrelated company remains irreverent, and the ALJ properly refused to hear the testimony. Additionally, a situation involving a public internet posting does not compare to the private, employee-only posting at issue here. It also remains unknown whether a union organizing campaign was taking place at this other company, whether the subject of the posting publicly testified in opposition to a union organizing priority, or whether the company had a Workday policy that restricted the application's use.

terminated" (emphasis added) and feared Moran would be terminated as well if Ortiz revealed his name. (Tr. 524, 529) Ortiz told Gecewich did not know where the screenshots had come from, but he received them via text message. (ALJD 57; Tr. 1823)

Gecewich next sought to obtain logs from Workday reflecting the names of those who had viewed Pratt's and Ives's Workday profiles. (GCX 81; Tr. 1828-29). This required requesting the information from the third-party company Workday, because Tesla did not routinely monitor employees' usage of Workday and did not have access to sign-in information. (ALJD 57; Tr. 1827-28). After a week without receiving the information, Gecewich asked a Tesla employee for an update on his request, further stating "Please be aware this case is being closely monitored by Gaby [Toledano] and I am providing updates as they come in." (ALJD 58; GCX 81). On October 4, 2017, Gecewich elevated his request to a supervisor, informing him "We should update Gaby and team shortly." (ALJD 58; GCW 81). ALJ Tracy found that Gecewich was not credible in his denials as to whether Toledano was monitoring the investigation. (ALJD 58).

The Workday logs ultimately revealed that Moran and an individual named Krista Washington viewed Pratt's and Ives's profiles on September 14, 2017, and so Gecewich interviewed Moran. (ALJD 58; Tr. 727; GCX 81). Moran explained that he viewed Pratt's and Ives's profiles to determine whether the individuals that testified in the public hearings were actual employees of Tesla. (ALJD 58; Tr. 731-732). Moran further explained that he uses Workday to view the titles and start dates of co-workers, in order to understand their advancement in the Company compared to his own. (ALJD 58; Tr. 731).

On the same day, Gecewich met again with Ortiz and questioned him regarding the screenshots. (ALJD 58; Tr. 528-530). Ortiz eventually admitted Moran sent him the screenshots but continued to express his concern that he was going to be fired no matter what and his desire to protect his co-workers from problems he had started. (ALJD 59; Tr. 529, 1842-1844)

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### 4. Tesla Management Accepts the Recommendation to Terminate Ortiz

Following these meetings, Gecewich drafted an investigation report recommending termination for Ortiz and a warning for Moran. (ALJD 59-60; GCX 86). He also spoke with Hedges about his recommendations and they decided that the decision maker for the termination should be Director of Manufacturing Stephen Graminger. (ALJD 60; Tr. 1262).

However, Gecewich withheld or distorted essential mitigating facts from the decision maker Graminger. The final investigation report simply omits the fact that Pratt and Ives testified publicly at the State capital regarding their name, job title, pay, and working conditions at Tesla – the very impetus for Ortiz and Moran's conduct. (ALJD 61; GCX 62; Tr. 2201) This omission was not even an oversight – the information was removed after appearing in an early draft. (ALJD 60; GCX 62, 86) Gecewich further failed to inform Graminger that the posting occurred in a private, not public, Facebook group, containing only Tesla employees, with the group topic being unionization at Tesla. (ALJD 61; CPX 4) He even provided false information to Graminger, including stating that the Facebook post contained "internal information" that included a "telephone number and personal information." (ALJD 61; Tr. 1288, 1322). When Graminger asked if similar situations had been handled this way, Gecewich said yes, without any details. (ALJD 62; Tr. 1293-94, 1301-02).[5] ALJ Tracy did not credit either Gecewich or Graminger's declaration that Ortiz's union activity was not discussed in the meeting. (ALJD 62)

Despite not having these essential mitigating facts, Graminger still hesitated before making any decision, recognizing that Ortiz's well-known union activity made this a "sensitive case." (ALJD 62; Tr. 1290, 1919) Graminger decided to consult a superior, Vice President of Production Peter Hochholdinger, who ultimately supported the termination of Ortiz. (RX 15) However, Hochholdinger suffered from an even larger deficit of information than Graminger, as he did not review the investigation report or even know the circumstances of the investigation in

[5] ALJ Tracy found Graminger a more credible witness than Gecewich. (ALJD 61).

which Ortiz lied. (Tr. 1290) What Hochholdinger did know, like Graminger, was that Ortiz was a prominent union supporter. (ALJD 62; Tr. 1290, 1310) In the end, Graminger did not conduct his own investigation, speak to Ortiz, or ask Ortiz why he did not want to disclose where he got the screenshots. (GCX 62; Tr. 1302, 1304, 1324)

**5. Respondent Terminates Ortiz and Disciplines Moran**

Ultimately, Graminger approved the termination and Gecewich informed Ortiz of this decision on October 18, 2017. (ALJD 63; Tr. 532). Later, on May 20, 2018, Tesla CEO Elon Musk provided a different explanation for the termination: "Only known union person fired was a guy who repeatedly threatened non-union supporters verbally & on social media & lied about it." (GCX 38, JX 4, ¶ 4). This public tweet is still posted on Musk's Twitter account and viewable by the public. (JX 4, ¶ 5).

On October 19, 2017, Gecewich issued Moran a warning about his use and access of Workday. (Tr. 738) Gecewich informed Moran, for the first time, that Workday was only for "business purposes." (Tr. 738; GCX 42). No supervisors, managers or human resources employees had ever discussed any policies about using Workday with Ortiz, Moran, or any of the other VOC members prior to October 2017. (ALJD 52; Tr. 389-90, 442, 672). Ortiz and Moran first learned that they could be disciplined for their use of Workday for "personal purposes and without a proper business justification" when they were terminated and disciplined, respectively. (GCX 42).

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## III

## ARGUMENT

### A. THE ALJ CORRECTLY DETERMINED THAT TESLA UNLAWFULLY TERMINATED ORTIZ AND DISCIPLINED MORAN IN VIOLATION OF SECTION 8(a)(3)

#### 1. The ALJ properly analyzed Ortiz and Moran's activity under the current Board standard and determined that it was both protected and concerted.

ALJ Tracy correctly applied the Board's standard and determined that Ortiz and Moran were engaged in concerted protected activity for the purpose of mutual aid and protection when Moran sent the Workday profile screenshots to Ortiz. Section 7's "mutual aid or protection" clause guarantees "the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). An employee's activity is "concerted" if the employee "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded *sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*). Protected activity can take many forms, including testifying on behalf of employees before legislative bodies concerning workplace issues. *See, e.g., Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1385 (9th Cir. 1976).

Ortiz and Moran were engaged in protected concerted activity when they went to Sacramento in August 2017 to campaign for greater legislative oversight of working conditions at Tesla. Ortiz and Moran were also engaged in protected concerted activity on September 14, 2017, when they communicated regarding employees Pratt and Ives, who went to Sacramento to speak publicly in opposition to Ortiz and Moran's efforts. Ortiz requested Moran's assistance in determining whether these individuals were actually Tesla employees, and Moran, with the assistance of Workday, provided Ortiz confirmation that they were in fact Tesla employees. Ortiz then used this information to criticize the employees for opposing the legislation by posting

the individuals' Company profiles on a private, employee-only Facebook page. As the ALJ correctly found, this private Facebook page was a forum for employees to discuss unionization at the workplace, "essentially a virtual watercooler." (ALJD 65) The ALJ also correctly determined that Moran and Ortiz engaged in concerted activity which was protected because "each of their actions was to promote the union organizing drive at Tesla for the mutual aid and protection of all employees and to improve the terms and conditions for all employees." (ALJD 66)

Respondent's feigned confusion over why Moran used Workday in the manner he did does not remove the Act's protection. Moran was asked whether two individuals testifying at the State Capitol in opposition to the union were Tesla employees. Moran provided visual confirmation that they were.

**2. The ALJ Correctly Applied Board Precedent with Respect to Terminating an Employee for Lying Regarding Protected Activity**

Contrary to Respondent's briefing, Ortiz's refusal to provide his co-worker's name during the investigation did not remove him from protection under the Act and permit his termination. The ALJ correctly stated the Board standard that an employer may not terminate an employee for lying in response to questions regarding protected activity, citing *Tradewaste Incineration*, 336 NLRB 902, 907 (2001) and *St. Louis Car Co.,* 108 NLRB 1523, 1525-26 (1954).

The Company's attempts to distinguish *Tradewaste* and *St. Louis Car Co.* fall flat. *Tradewaste* involved an employee posting a critique of a specific pro-employer co-worker on a bulletin board in the workplace. The posting publicized the employee's high wage of $18.75 per hour and stated, "this shows that this company has no regard for the guys who has worked [sic] to get where they are." The employer then questioned two employees as to whether they were involved in writing, photocopying, or posting the notice, and ultimately the employer suspended an employee for lying about his involvement with the notice. The Board found this suspension was unlawful. Ortiz's post criticized a specific pro-employer co-worker in similar terms, calling out his earnings of $130,000 last year and stating, "the ones that do the real work get passed

over." In both *Tradewaste* and this case, the employer demanded that a pro-union employee reveal who was involved in a posting to co-workers regarding working conditions, the employee refused to reveal that information, and the employer terminated the employee for lying. Respondent's attempt to distinguish this case is incoherent – there has never been any allegation that Ortiz improperly obtained Pratt's wage information. That information is not even viewable on Workday. And the employer's pretext that it was merely investigating improper Workday access is just that, relying as it does on a concocted workplace rule invented after the fact to justify an investigation of union activity.

*St. Louis Car Co.*, also applies here108 NLRB 1523 (1954). In *St. Louis Car Co.*, an employee denied she was trying to organize a union at the company in response to the employer's direct questioning. After discovering she had lied, the employer fired her for untrustworthiness. The Board found that it was "farfetched to say that an employee has shown that she is untrustworthy by trying to keep her employer from prying into matters which are" protected, and determined the justification was a pretext for union discrimination. Even when the company claims it applies a strict standard of trustworthiness for all employees, an employee cannot be terminated for refusing to reveal involvement in protected concert activity. *Id. See also Paragon Systems*, 362 NLRB No. 182 (2015) (employees did not lose the protection of the Act when they lied to an investigator regarding their involvement in delivering a strike notice); *United Services Automobile Association*, 340 NLRB 784, 793 (2003) *enfd.* 387 F.3d 908 (D.C. Cir. 2004) (employee did not lose the protection of the Act when she lied to an investigator regarding her involvement in distributing flyers to co-workers encouraging participation in a concerted action).

### 3. The ALJ Correctly Distinguished the Board's Decision in *Fresenius*

Respondent contends that *Fresenius*, 362 NLRB No. 130 (2015) requires a different result. In *Fresenius*, an employee scribbled vulgar, offensive, and threatening language on several union newsletters left in an employee breakroom. This language could be understood as demeaning to women. *Fresenius*, 358 NLRB 1261, 1272 (2012) *judgment reversed* 362 NLRB

No. 130 (2015). The employee's conduct occurred in the period immediately before a decertification election, and five of the twelve individuals in the unit were women. *Id.* After several women complained that the statements were vulgar, offensive, and threatening, the employer launched an investigation into who made the harassing comments.

Unlike *Fresenius* (2015), in this case Respondent did not receive a bona fide complaint of harassment, nor did Respondent conduct an actual investigation into harassment. Far from reporting harassment, employee Pratt first raised the issue in a text message to the executive coordinating the company's opposition to the union at the State Capitol. Pratt's lighthearted message to Hedges—"[l]ooks like we got under some people's skin" with a smiley face emoji—plainly demonstrates he viewed Ortiz's post as part of the push and pull between union supporters and union critics, not offensive harassment. In addition, the Company's investigation did not even attempt to investigate the supposed harassment. Gecewich admitted he actually avoided looking into the details of Ortiz's post, instead focusing entirely on the supposed improper use of Workday.

Finally, the *Fresenius* Board found that the company's decision to investigate was "consistent with its anti-harassment policy, Federal statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and state anti-discrimination statutes." 362 NLRB at 1066. Respondent does not even attempt to make a similar claim. There is no comparison between Ortiz's post and the offensive, sexiest language that launched a bona fide investigation in *Fresenius*.

**4. The ALJ Correctly Found That the Respondent's Termination of Ortiz Violated the Act Under *Wright Line***

In *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), approved in *Transportation Management, Inc., v. NLRB,* 462 U.S. 393 (1983), the Board established an analytical framework for deciding discipline and discharge cases where the employer claims its motivation for disciplinary action was not based on the employee's protected concerted activities. As explained above, Respondent's stated reason for terminating Ortiz, lying,

was in fact protected concerted activity, arguably making a traditional *Wright Line* examination unnecessary. Nonetheless, ALJ Tracy analyzed the termination under *Wright Line* and correctly determined under this test that Respondent violated the Act.

The General Counsel must first establish that (1) employees engaged in union activity; (2) the Employer knew of the existence of protected activity; and (3) it was a "motivating factor" in the employer's decision. *Id.* To meet this burden, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007). The burden then shifts to the employer to demonstrate it would have taken the same actions even absent the employees' protected conduct. *Wright Line, Inc.*, 251 NLRB at 1089.

ALJ Tracy properly found that Ortiz engaged in protected concerted activity and that the Respondent, including its agents Hedges, Gecewich, Graminger, and Hochholdinger, were well-aware of Ortiz's activities. (ALJD 68). Respondent did not except to these findings.
The Administrative Law Judge also correctly found that union animus was a substantial or motivating factor in the adverse employment action, basing this on the Respondent's failure to conduct a complete and objective investigation, Respondent's shifting reasons for the investigation, the lack of comparable discipline issued for similar circumstances, the timing of the events in proximity to protected activity, and animus demonstrated toward union supporters, including Ortiz, in contemporaneous 8(a)(1) violations. (ALJD 68-70).

**a. Respondent Engaged in a Demonstrated Pattern of Union Animus Even Before the Investigation**

The ALJ correctly found that the Respondent's union animus toward Ortiz and other union supporters supported her finding that Ortiz's termination was unlawfully motivated. (ALJD 68). The Judge based this finding on the numerous unfair practices committed by Respondent and the entire record. Following the ALJ's decision, the Respondent conceded that it committed seven of the unfair labor practice violations described in the decision. The record is replete with additional examples of animus.

Respondent did not except to the ALJ's finding that it violated Section 8(a)(1) on four occasions on February 24 and one occasion on May 10, when its security guard agents asked leafletting employees, including Ortiz and Moran, to produce their employee badges and/or told them to leave the premises. (ALJD 15-25) The leaflet in question on February 24 was an article written by Moran criticizing Tesla, entitled "Time for Tesla to Listen." (ALJD 15; GCX 8; Tr. 48, 450)

Respondent also did not except to the Judge's finding that Supervisor Armando Rodriguez violated Section 8(a)(1) of the Act on March 23, 2017 by requiring pre-authorization for the distribution of union stickers, leaflets, and pamphlets and threatening employees with termination for not obtaining pre-authorization. (ALJD 25-27) Finally, Respondent did not except to the finding that it violated Section 8(a)(1) of the Act in August 2017 when Supervisor Homer Hunt told employees it would be futile to select the Union as their bargaining representative.

Furthermore, Tesla management openly described Ortiz, Moran, and the other VOC activists as enemies from the beginning of the Union's campaign. CEO Musk called Moran's union advocacy "morally outrageous" while adding darkly that Moran "doesn't really work for us." Toledano identified Ortiz and his fellow VOC members as "adversaries" when discussing how to neutralize them with Musk in June of 2017. Such clear employer animus is powerful evidence of pretext. *See Jim Walter Resources*, 324 NLRB 1231, 1233 (1997) (employer's animus toward former employee's protected concerted activity supports 8(a)(3) finding).

**b. Tesla's Investigation Was Designed to Produce a Pretext to Discipline Ortiz and Moran**

From the outset, Tesla's investigation of Ortiz and Moran departed from the normal course of Company investigations into employee misconduct. This departure began when Pratt sent Hedges a text message mocking Ortiz for becoming upset about Pratt's and Ives's testimony in Sacramento. This was not a complaint from Pratt by any stretch of the imagination—he did not express any "fear," as Hedges later claimed, or complain that Ortiz had published any private

information about him. Nor did he follow the protocol that applies for employee complaints by contacting either the Employee Relations department, which investigates such complaints, or his supervisor.

Instead, Pratt texted Hedges, the management official who had recruited him to go to Sacramento in the first place, with a smiley face emoticon accompanied by the words "got under some people's skin." According to Gecewich's notes, Pratt also sent photographs of the Facebook post to others "as we were getting a rise out of people." The objective evidence demonstrates Pratt was celebrating, not complaining, and Respondent implicitly conceded this point when it chose not to call Pratt as a witness, despite his continued employment at Tesla.

Hedges did not pass on Pratt's text to the staff that would ordinarily investigate complaints of this nature, but instead notified top executives at Tesla: the Director of Employee Relations and Tesla's General Counsel. And while Hedges claimed he did not ask Gecewich to investigate Ortiz, Gecewich chose to initiate an investigation immediately after Hedges talked to him, without waiting for direction from anyone in management. ALJ Tracy saw through Hedges' self-serving testimony, finding him not credible. That decision was clearly correct.

Gecewich set up this investigation to first isolate and then entrap Ortiz. Gecewich was interested in uncovering the details of Ortiz's protected Section 7 activity, *i.e.*, in forcing Ortiz to tell him who had helped him obtain the screenshots he had used. He continued to demand that Ortiz tell him where he got the screenshots even after both Tesla's own IT staff and Moran had given him the answer, putting him in the impossible position of having to choose between lying and giving up his pro-union coworker. Gecewich's fixation on Ortiz's and Moran's protected activities is enough, on its own, to establish the illegal motivation of both the investigation and the discipline it produced.

Gecewich's investigation is remarkable as well for what he did not investigate: he showed little or no interest in any issue other than digging into Ortiz's and Moran's protected concerted activity, and learning who helped who and how. Gecewich was not concerned, for example, with Pratt's alleged privacy concerns. Similarly, even though Gecewich's investigative

report mentioned that Ortiz had posted Ives' photo as well as Pratt's, Gecewich did not even bother to interview Ives or Osbual.

Pretext may be demonstrated by various factors, including disparate treatment, shifting explanations, or an inadequate investigation into a discriminatee's alleged misconduct. *See Shamrock Foods*, 366 NLRB No. 117, slip op. at 27-28 (2018). An inadequate investigation provides particularly strong support for a finding of union animus because it demonstrates the process that management used to get to the result that it desired. *St. Paul Park Refining Co., LLC*, 366 NLRB No. 83 (2018).

In *St. Paul Park Refining* the Board found the Employer violated Section 8(a)(1) when it conducted an investigation into an employee's refusal to perform work in unsafe conditions and decided to forego interviewing relevant witnesses and chose to interview people "designed simply to substantiate its supervisors' versions of what occurred and justify their sending [employee] home." *St. Paul Park Refining*, 366 NLRB No. 83, *16. The Board stated that respondent's "lack of an objective and complete investigation is circumstantial evidence of pretext, establishing animus towards [employee's] protected concerted activity." *St. Paul Park Refining*, 366 NLRB No. 83, *16. In certain cases, the road not taken reveals as much as the avenues that the employer actually pursued.

Gecewich also tailored his investigation in order to avoid any overt references to Ortiz's and Moran's Section 7 activity and, in particular, their work pushing for greater regulatory oversight over Tesla—or to Pratt's and Ives' advocacy on behalf of Tesla that led to the Facebook posts that spawned his investigation. Thus, Gecewich not only did not mention the background of the September 14, 2017 post or Ortiz's and Moran's legislative work, but edited those references out of the report that he submitted to the group called together to decide what action to take.

The investigation was irregular in another respect: even though Gecewich chose two additional managers to be part of the process so they could provide input concerning Ortiz's employment history and work performance, it does not appear that they made any significant

contribution to the review of Gecewich's recommendation during this meeting. That recommendation had, moreover, already been approved by the legal department and included consideration of Ortiz's background. This panel appears to have been brought together to rubber stamp Gecewich's recommendation, rather than to render its own decision.

And contrary to Respondents assertions, ALJ Tracy did not make a business judgment on the adequacy of the investigation. Her decision cogently explains how Respondent's actions demonstrated union animus. Additionally, she found Hedges and Gecewich were not credible in their testimony on the investigation, covering up glaring omissions in the investigation. The Judge's finding that the investigation was a pretext to find fault with Ortiz and Moran is fully supported by the record.

**c. Tesla Would Not Have Taken the Same Actions Absent Ortiz's Union Activity.**

As the ALJ correctly found, proffering a nondiscriminatory reason for terminating Ortiz is insufficient; Respondent has the burden to demonstrate that it would have taken the same actions even absent the employee's union activity. *Wright Line*, *supra*, 251 NLRB at 1089; *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989) ("the burden shifts to the Respondent to show it would have taken the same action against the employees regardless of their union or other protected activities"). Tesla cannot carry that burden.

The Respondent's attempt to point to a comparator case involving lying ignores the fact that the investigation would not have occurred in the first place but for union activity. Absent Ortiz's union activity, Hedges would not have opened an investigation into Pratt's supposed "harassment," nor would Gecewich have ignored Pratt's original text message and fabricated his own investigation into Workday profile screenshots. Without these two acts, Ortiz would never have been questioned about who sent him the screenshots, and no lie would have occurred.

When Gecewich met with Stephen Graminger, Director of Manufacturing, the purported decision maker in Ortiz's case, the decision to terminate Ortiz was effectively set. Graminger and the others on the panel gave Gecewich's revised report only a few minutes of consideration, then

proceeded without bothering to conduct any investigation of their own, much less speak to Ortiz about the incident, even though Graminger had reservations about the wisdom of proceeding.[6]

A fair investigation would have done much more than simply sign off on Gecewich's report. Tesla's deviation from these procedural norms makes it virtually impossible for it to demonstrate what course of action it would have taken had it not rushed to reach the retaliatory outcome it wanted to achieve, much less prove that the outcome would have been the same.

Tesla's union animus and, in particular, its animus against Ortiz and Moran means that Tesla must make a particularly strong showing in order to rebut these charges. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); *see also Van Vlerah Mechanical*, 320 NLRB 739, 744 (1996). It cannot do so. Tesla violated the Act by firing Ortiz.

### 5. The Respondent's Request that the Board Overturn its Precedent Based on the Respondent's Categorization of "Core" Section 7 Rights Should be Rejected

Having failed to justify its unlawful actions under the applicable legal standard, Respondent invites the Board to overturn its prior decisions, and fashion a new standard based on Respondent's own arbitrary definition of "core" Section 7 activity. The Board should flatly reject Respondent's specious "Hail Mary" argument, which seeks to muddle clearly-established precedent, make a mess of the law, and introduce out of thin air a baseless distinction between "core" and "non-core" Section 7 rights.

Respondent begins by quoting the language of Section 7 of the Act, which guarantees employees' right "to self-organization, to form, join, or assist labor organizations, to bargain

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[6] Graminger expressed some reservation about following Gecewich's recommendation for termination since it was two employees engaged in protected concerted activity, so he followed up with his superior, Vice President of Production, Peter Hochholdinger. However, Graminger never once showed Hochholdinger the investigation report created by Gecewich, did not discuss the details of the investigation report or of the circumstances surrounding Ortiz's post, never pulled Ortiz's personnel files to review his work performance with Hochholdinger, or engaged in any investigative work to independently decide to terminate Ortiz or take other appropriate disciplinary action.

collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Respondent then audaciously puts forward its own view that "[t]he core rights protected by the Act are the first three listed in the statute"—to the exclusion of concerted activity, which Respondent evidently does not consider to be a "core" right protected under the Act. (Respondent Brief at 44) Respondent's does not present any authority or even any reasoned justification in support of the momentous shift in Board law it seeks to effect, relying simply on the fact that self-organization, forming, joining, or assisting labor organizations, and collective bargaining are listed first in the statute. Nor does Respondent indicate how the Board is to distinguish, for example, between employee "self-organization," and concerted activity carried out by employees in furtherance of such self-organization. Respondent's perfunctory effort to sustain its novel categorization of "core" Section 7 rights further demonstrates that this is a throwaway argument which Respondent itself does not expect to receive serious consideration.

Respondent goes on to argue that the Board should inject this newfound concept directly into its standard governing employee dishonesty during workplace investigations, and in so doing "build upon its precedent in *Fresenius* [...]." (Respondent's Brief, at 45) In fact, as noted above, the ALJ correctly analyzed and distinguished the Board's decision in *Fresenius*, wherein "the Board found that an employee's dishonesty during an investigation of misconduct of alleged harassment and threats was unprotected by the Act due to the focus of the investigation on the allegation, and not on any union activity." (ALJD at 44) Further, in deciding *Fresenius*, the Board specifically noted that "there is no credible evidence that the investigation occurred in a context of employer hostility to protected union activity," and that the employee's lies "did not implicate a legitimate interest in shielding his Section 7 activity from employer inquiry." *Fresenius*, 362 NLRB at 1066. The Respondent's categorization of "core" rights is entirely absent from *Fresenius*; far from "building upon" the Board's reasoning, Respondent's ill-conceived idea cannot be reconciled with the logic of the decision.

The ALJ's opinion faithfully applies the distinction the Board has drawn between self-serving dishonesty by employees seeking to shield their own improper actions, and dishonesty in the face of unlawful questioning regarding protected, concerted union activity, as occurred in this case. The ALJ's thoughtful analysis of the issue itself demonstrates the ability of a legal fact-finder to intelligently discern which is which, belying Respondent's assertion that "every employee now has carte blanche to lie during an investigation, merely by suggesting that it might in some way be related to protected concerted activity." (Respondent Brief at 44)

### 6. ALJ Tracy Correctly Found That Respondent Disciplined José Moran for His Concerted Protected Activities in Violation of Section 8(a)(3)

Respondent's argument that Moran improperly accessed and shared Workday profiles is nothing but a fantasy, contradicted by the undisputed record. Tesla chose to give each of their thousands of employees the ability to access the Workday profile of every other employee at the plant. This profile contained only the most basic information about each employee – their name, their picture, and their job title. It was an employee directory with no contact information. The undisputed, credited evidence established that Tesla never placed any limitations or restrictions on the use of this information. (ALJD 52). Respondent instead made the affirmative choice to grant wide access, perhaps as an example of the anti-hierarchical, start-up culture that Tesla sought to embody.

Lacking evidence, Respondent resorts to *ad hominem* attack, describing Moran's conduct as "surreptitious" and "hacking." (Respondent Brief at 48, 51). Respondent's accusations only highlight the weakness of its argument. None of the information was proprietary, confidential, or even secured from employees. Tesla made the information available to employees without restriction, and employees used and shared that information with each other freely.

Respondent further distorts the record by stating that employee information was shared "externally." The undisputed evidence shows the information was only shared with co-workers who themselves had access to the same information.

Respondent's wishful thinking extends to its comparison with *Roadway Express*, 271 NLRB 1238, 1239 (1984). In *Roadway*, an employee opened an unlocked file cabinet in a limited-access office and removed documents that related to an alleged contract violation. The Board found that, even without a written rule, the employer had an expectation for employees not to access private business records without authorization. Plainly, a document in the file cabinet of a limited-access office is not the same as an employee directory to which an employer affirmatively grants all employees access.

As the ALJ correctly noted, *Ridgely* provides the more accurate comparison. In *Ridgely*, the Board determined timecards containing employees' names were not private or confidential because they were available for all employees to see. *Ridgely Mfg. Co.*, 207 NLRB 193, 197 (1973). The Board therefore determined that an employee could not be terminated for reviewing the timecards for use in union organizing efforts. *Id.* The Workday profiles were similarly available for all employees to view. In fact, unlike *Ridgely*, where the timecards were on display by necessity, the Respondent *affirmatively chose* to allow all employees to view and search for the Workday profiles of other employees.

Respondent's protests that it either had no duty to inform employees about the limited allowable uses for Workday profiles, or that such a specific rule is implied within its generalized handbook exhortations to employees to set "high expectations," do the "right thing," and "treat everyone like you want to be treated." (Respondent Brief at 52-53). Respondent has evidently lost all perspective and grounding in the facts, characterizing Moran's protected actions as so egregiously wrongful that "common precepts" mandate his discipline. The credited facts of this case, which Respondent distorts at its whim, are that Workday profiles contain only an employee's name, picture, and job title. Presented with access to such data, it is by no means common sense that an employee could not use this data to organize a plant softball league, identify a neighbor for a carpool, assign dishes for a unit potluck, or set up a support group for coworkers trying to quit smoking.

What Respondent actually means is that it was common sense that Workday Profiles could not be used to assist in *union organizing*. Tellingly, Respondent is unable to name any other employees disciplined for misusing Workday. Disparate treatment of employees who engage in protected concerted activity supports a finding of unlawful motivation for discipline. *Carpenters Health & Welfare Fund*, 327 NLRB 262 (1998) (finding disparate treatment where employer offered no evidence that it had ever discharged others for violating telephone policy); *Consec Security,* 325 NLRB 453 (1998) (finding disparate treatment where employer failed to demonstrate it had ever discharged an employee for similar so-called insubordination).

Further, discipline for violating a non-existent and wholly undefined work rule is a classic example of pretext. Respondent permitted employees to view their co-workers' Workday profiles without restriction or limitation, then disciplined an employee for using Workday in a manner that supported a union organizing campaign. As ALJ Tracy found, Respondent invented a rule and applied it *ex post facto* in order to justify disciplining Moran for his protected activity. *See Morgan Precision Parts*, 183 NLRB 1141, 1144 (1970) (discharge of union supporter based on nonexistent production quota violated the Act). This is a clear violation of Sections 8(a)(3) and (1) of the Act.

## B. THE ALJ CORRECTLY DETERMINED THAT RESPONDENT UNLAWFULLY INTERROGATED ORTIZ AND MORAN

Applying the Board's standard under *Rossmore House*, 269 NLRB 1176 (1984), ALJ Tracy correctly found that Respondent unlawfully interrogated Ortiz on September 21 and October 12, and Moran on October 12. Respondent launched an investigation into a union supporter's Facebook post, written during his free time and away from work, about a campaign to persuade the state legislature to exercise greater oversight over working conditions at Tesla.

Moreover, Tesla pushed forward with this investigation even though it was clear from the outset that this was nothing more than a disagreement between two employees regarding the merits of a union. Ortiz took down his post about Pratt and Ives after two hours, when Pratt

emailed him to say that this was not a good way to open communications. Pratt then joked to the HR manager who had recruited him to go to Sacramento that "we got under some people's skin."

However, Hedges directed Gecewich to open an investigation, and Gecewich questioned Ortiz about his union Facebook post. The investigator focused almost exclusively on finding out who Ortiz had talked to and where he got the information he used to post his comments about Pratt and Ives—the sort of details about employees' communications with each other about their concerted activities that are not properly the subject of employer inquiry. *Guess!, Inc.,* 339 NLRB 432 (2003). An improper investigation became progressively more intrusive, coercive, and unlawful as it proceeded.

After Gecewich determined Moran had sent the photos, he questioned Moran about his protected concerted activity. Even though he already knew the answers to his questions, he interrogated Moran about whom he sent the screenshots to and why he did so. Still not content, Gecewich once again questioned Ortiz, again pressing him for details about his sources for information about Pratt and Ives and his private communications with his coworkers, even though he had already discovered the answer to his questions.

### C. THE ALJ PROPERLY DECIDED THAT CEO MUSK'S STATEMENT REGARDING STOCK OPTIONS WAS A THREAT OF REPRISAL THAT VIOLATED SECTION 8(a)(1) OF THE ACT

On May 20, 2018, Tesla CEO Musk issued a public statement via Twitter that threatened to take away Tesla employees' stock options if they chose to unionize. Specifically, while discussing employees' option to vote for a union, he rhetorically asked "[b]ut why pay union dues & give up stock options for nothing?" This constitutes a blatant "threat of reprisal" under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969) in violation of Section 8(a)(1) of the Act.

Section 8(a)(1) of the National Labor Relations Act prohibits employer conduct that has a reasonable tendency to coerce employees in the exercise of their Section 7 rights. *American Freightways Co.,* 124 NLRB 146 (1959); *Gissel,* 395 U.S. at 618. No proof of the employer's intent or the employee's reaction is necessary to establish a violation of Section 8(a)(1) of the

Act. *El Rancho Market*, 235 NLRB 468, 471 (1978). Employer statements that threaten to take away employee benefits, including stock options, if employees choose to unionize tend to coerce employees' rights under the Act and thus violate Section 8(a)(1). *KSM Industries*, 336 NLRB 133, 133 (2001); *Ready Mix, Inc.*, 341 NLRB 958, 960 (2004).

The Supreme Court has long distinguished between threats of reprisals that violate Section 8(a)(1) and employer free speech that lawfully predicts the effects of unionization. *Gissel*, 395 U.S. at 618. As the ALJ properly stated, for a prediction to be lawful, the effects of unionization must be "carefully phrased on the basis of objective fact" and involve "probable consequences beyond [the employer's] control." *Id.*; *Systems West*, 342 NLRB 851, 852 (2004). If these factors are not met, then the statement is not a prediction, but a "threat of retaliation based on misrepresentation and coercion." *Gissel*, 395 U.S. at 618. Such statements enjoy no protection under Section 8(c) of the Act or the First Amendment. *Id.*

Musk's statement does not meet the standard under *Gissel* for a carefully stated lawful prediction. First, it does not state an objective fact. If Tesla employees unionized, Section 8(a)(5) of the NLRA would require Tesla to maintain all existing terms and conditions, including employee stock options, until the parties reach a collective bargaining agreement. If Respondent forced employees to "give up" their stock options because they voted in favor of unionizing, that would violate the Act. Musk did not come close to "carefully phrasing" an "objective fact."

Second, the statement does not convey a consequence that is outside of the Employer's control. Tesla controls its employee stock option plan, so it makes the ultimate decision on who is eligible. Excluding unionized employees from the stock option plan is therefore not a lawful prediction outside the employer's control but is instead an unlawful threat of retaliation.

**1. CEO Musk's Twitter Statement Was Unambiguous**

The ALJ correctly found that CEO Musk's tweet unambiguously indicated that if the employees vote to unionize, they would give up stock options. The statement—"Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw [tomorrow] if they wanted. But why pay union dues & give up stock options for nothing?"—plainly includes a

rhetorical question. Musk is providing a reason why the workers should not vote for a union: it will cause the workers to owe union dues and lose their stock options.

Simply because the statement is in the form of a rhetorical question does not make the statement ambiguous. In *Concepts & Designs, Inc.,* 318 NLRB 948, 954 (1995), after the company inadvertently failed to print an employee's check, the company president stated to the employee, "It would sure be nice to get one of these every week, wouldn't it?" Despite not mentioning the union or the employee's support of it, the Board found this remark to be an implied threat that violated Section 8(a)(1).

In *KSM Industries*, the operations manager told strikers "these people in here have jobs" and asked "[w]hat are you doing for a livelihood?" 336 NLRB at 133. The Board found this comment violated Section 8(a)(1) because it was "plain that [the manager's] comment and question were simply another way of telling the strikers they were out of a job" and therefore the "rhetorical questioning had a reasonable tendency to coerce." *Id.*

**2. The Act Prohibits Threats of Reprisals Against Employee Stock Options**

CEO Musk's threat is unfortunately not unique, or an issue of first impression. The Board has repeatedly found that threatening employees with the loss of stock options if they unionize violates Section 8(a)(1). In *Ausable Communications,* the Board found a violation of Section 8(a)(1) where a supervisor told two employees that they "would lose their rights to acquire company stock in the future" if the workplace unionized. 273 NLRB 1410, 1413 (1985). In *Ready Mix, Inc.*, the Board found an 8(a)(1) violation where an employer stated in a memorandum to its employees that they could not continue to participate in its employee stock option plan if they chose union representation. 341 NLRB 958, 960 (2004). In *Dynacorp*, 343 NLRB 1197 (2004) the Board found an 8(a)(1) violation where a supervisor told employees that the employer would immediately cease making its contribution to the employee stock ownership plan if the employees unionized.

The Board has also reached the same conclusion for similar threats involving 401(k) plans. In *Smithfield Foods*, 347 NLRB 1225 (2006) the Board found that an employer unlawfully

threatened employees when the plant manager announced a new 401(k) program for employees but stated that employees would lose their eligibility if they voted for the union. *Id.* at 1229;[7] *see also E & L Plastics Corp.*, 305 NLRB 1119, 1120 (1992) (finding an 8(a)(1) violation where pension and profit-sharing plan unlawfully conveyed to employees the impression that they would automatically lose retirement benefits if they were ever to unionize); *Meyer Jewelry Co.*, 230 NLRB 944 (1977) (finding an 8(a)(1) violation where supervisor threatened loss of profit-sharing benefits if union came in).[8]

**3. Musk's Twitter Statement Did Not Refer to Collective Bargaining**

As the ALJ properly recognized, Musk's statement was not "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel*, *supra* at 618. Statements implying that employees might lose benefits if they unionize may be lawful "when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations." *Taylor-Dunn Mfg. Co.,* 252 NLRB 799, 800 (1980); *Kezi, Inc.,* 300 NLRB 594, 595 (1990). But Musk's statement does nothing of the sort.

In *Kezi*, the employer implied that unionized bargaining units were excluded from the company's 401(k) plan, but also clearly stated that employees' retirement benefits would be the subject of good-faith bargaining. *Id.* The Board found no violation of the Act, drawing a distinction between lawful statements that indicate "benefits for unionized employees are subject

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[7] Tesla's citation to *Smithfield Foods* (Respondent Brief, at 23) ignores this 401(k) finding, and instead references a separate finding in the case that a statement describing past plant closures is lawful, which is irrelevant to the facts here.

[8] The Board has also found that similar comments warrant overturning representation elections because they convey a threat in retaliation for employees' exercise of their right to choose to be represented. In *BCI Coca-Cola Bottling Co.*, 339 NLRB 67 (2003) a branch manager told an employee that "with the Union, there is no 401(k)." The Board found that this comment, and the Company's later failure to clearly disavow it, required the direction of a second election. In *Hertz Corp.*, 316 NLRB 672 (1995) the Board overturned an election after the employer distributed a summary of its 401(k) plan during the union campaign that stated a 401(k) benefit existed "only for non-unionized Hertz shops." *Id.* at fn. 2, 695. The Board found this statement "conveyed the impression that the employees would lose the 401k plan immediately on choosing union representation." *Id.* The Board further found that the employer's oral explanation of the negotiation process was insufficient to dispel this impression.

to negotiation" versus unlawful statements that suggest that employees are "foreclosed from inclusion in a particular plan simply because they have a union bargaining on their behalf." *Id.*

*Histacount Corp.*, 278 NLRB 681 (1986), cited by Respondent, stands for the same proposition. In *Histacount*, the employer stated that bargaining can take a long time, the company is permitted to "bargain from ground zero," and there is no guarantee existing benefits will survive bargaining. The Board found these statements legal, because they were "made in a context which would indicate to employees that bargaining is a process in which each side makes its own proposals, that it requires mutual agreement, and where existing benefits may be traded away." Thus, the statement did not convey that the employer "would unilaterally discontinue existing benefits if the employees selected union representation, but rather that existing benefits may be lost as a result of bargaining." *Id.* at 689.

In this case, neither Musk, nor anyone else from Tesla, has stated that Tesla will engage in good faith bargaining over stock options if the employees choose union representation. Because the Company has never even suggested that employees would have the right to bargain before they would lose their stock benefits, but simply presented this loss of stock as a certain consequence of unionization, the statement is coercive.

**4. Tesla's Alternate Interpretation Is an Unreasonable Reading of the Statement**

Respondent asserts that the intended meaning of Musk's Tweet was that the UAW, not Tesla, would make employees give up their stock options, supposedly because the UAW does not permit or favor such benefits. (Respondent Brief, at 24). In support of this argument, Tesla points to two subsequent Twitter statements on May 22 and May 23, 2019 by Musk, and two statements by unknown Twitter users. As the ALJ correctly found, Respondent's proffered interpretation of the May 20, 2018 Tweet is wholly unreasonable.

Respondent argues that its interpretation is supported by a reading of Musk's statement in a wider context. (Respondent Brief, at 23-24). Yet such an examination of wider context does the Respondent no favors. At the time of Musk issued his statement on whether employees at his

Company should unionize, Tesla employees were actively organizing their co-workers in support of a union and the NLRB General Counsel had issued a complaint alleging Respondent committed multiple unfair labor practices. The Respondent had already harassed employees distributing union literature, interrogated employees seeking health and safety information, and terminated one of the most prominent union supporters in the plant. Musk's Twitter account was also closely watched at this time due to his penchant for announcing Company news and making other off-beat remarks through the platform. Even Gaby Toledano, Tesla's Chief People Officer during this time, admitted she would "track Elon's tweets" to make sure he "was not tweeting dumb stuff." (Tr. 954). Under these circumstances, Musk broadcast his statement to 22.7 million Twitter followers, and his message quickly garnered attention, including from Respondent's employees and UAW organizers. (Tr 52, 953).

Following his Tweet regarding stock options, Musk issued several additional Tweets on that same day regarding unionization and the terms and conditions of Tesla employees. (GCX 38). None of these statements clarified or retracted his statement about stock options. An additional day went by, with Musk issuing more statements on Twitter, none of them addressing the original statement either.

The "context" Respondent argues is necessary to correctly understand Musk's May 20, 2018 Tweet is to be found in Tweets which were posted two and three days later, with dozens of other Musk Tweets falling in between. Because of the structure of Twitter, many individuals who saw the first Tweet did not see Musk's subsequent Tweets two days later. Musk did not delete or edit his original, coercive statement—in fact, the statement remains online and visible to employees today.

Further, Musk's additional statements do nothing to decrease the coercive effect of the May 20 Tweet. If anything, they increase the coercion. On May 22, 2018, Musk Tweeted:

> No, UAW does that. They want divisiveness & enforcement of 2 class "lords & commoners" system. That sucks. US fought War of Independence to get *rid* of a 2 class system! Managers shd [should] be equal w easy movement either way. Managing sucks btw. Hate doing it so much.

(GCX 69-2). To understand this statement as a clarification, Tesla asks that the statement be read in conjunction with a statement from an unknown Twitter user named Eric Brown, which stated "Hi Elon, why would they lose stock options? Are you threatening to take away benefits from unionized workers?" (GCX 69-2). This statement did not originate from Respondent or its agents, and Respondent strains credulity by suggesting that this user's statement reached as many employees as Musk's original Tweet, or that Musk's Tweet would be understood by his Twitter followers as a direct response to this user.

Tesla's presentation of two Tweets as a concise, email-like chain does not accurately represent how Twitter actually displays Tweets. If an employee was following Musk's Twitter Account, Musk's statements would appear on the employee's Twitter 'Timeline,' along with Tweets from other individuals who the employee chose to 'follow.' The Timeline is the default home page for individuals viewing Twitter. Statements by Twitter users who an individual does not follow would not appear on the Timeline. Only by clicking on individual Tweets in the Timeline would a viewer see the statement a Tweet responds to. Alternatively, if an employee clicked on Elon Musk's account, the employee would simply see a list of all of Musk's Tweets, not what he was replying to. The employee would only see another user's underlying Tweet to which Musk was responding if the employee clicked on an individual Musk Tweet.

Even if employees did see the Tweet Musk was responding to on May 22, 2018, Musk's statement "No, UAW does that" remains confusing. He does not explain how UAW could "take away" stock options from unionized workers. Nor does his statement assure employees Tesla would engage in good faith bargaining if they chose to unionize. Instead, the CEO issues another threat, warning that unionization will bring "divisiveness," a "2 class system," and the loss of "easy movement" between manager and employee status.[9]

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[9] *See Hendrickson USA*, 366 NLRB No. 7 (2018) (employer violated Section 8(a)(1) when it stated that, if the employees chose to unionize, "the culture will definitely change," "relationships suffer," and "flexibility is replaced by inefficiency," while extolling the existing "easy-going atmosphere" of the workplace.)

On May 24, 2018, Musk issued another statement, saying "Exactly. UAW does not have individual stock ownership as part of the compensation at any other company." (GCX 69-3) This inaccurate statement, occurring three days after the initial coercive Tweet, also does not correct or even mitigate the coercive effect of the May 20, 2018 Tweet. The May 20, 2018 Tweet remains unedited and undeleted today, and this Tweet does not appear directly below it. This May 23, 2018 Tweet also does not provide a logical explanation for why Tesla employees would have to give up the stock options they currently possess, or state that such benefits are subject to bargaining. Tesla further argues that the word "exactly" provides clarification because it should be read in context with comments by two more unknown Twitter users, "Therm Scissorpunch" and "Wooter." Again, this is not useful context, because Tesla employees and the public were far more likely to see Musk's Tweets than the Tweets of these unknown users.

**5. Respondent Fabricates Evidence in an Attempt to Find an Objective Basis for Musk's Statement**

Even if the Tweet is interpreted as Respondent prefers, Respondent lacks any objective facts in the record to support its position that the UAW does not permit or favor stock options. Lacking such evidence, Respondent resorts to inventing it. Respondent Brief at page 26 claims UAW organizers "dismissed the value" Tesla stock options and that "none of their contracts provide for employee stock options." Zero support for these statements exist in the record of this case.[10] If Respondent had attempted offer such evidence at the hearing, Charging Party UAW would have shown both statements are wrong. The UAW currently represents employees who participate in stock ownership plans, and UAW organizers have not dismissed the value of Tesla stock options.

Even under Tesla's preferred interpretation, the Twitter statement simply does not state an objective fact outside the employer's control. *See Ed Chandler Ford, Inc.,* 254 NLRB 851

[10] The record does demonstrate that a spokesperson for UAW stated, in a news article about Musk's May 20, 2019 Tweet, that the Union does not have a policy preventing UAW-represented employees from owning stock options. (RX 45C).

(1981) (Board found 8(a)(1) violation where employer's prediction that employees would lose bonuses if they unionized because the union's contracts with other car dealerships did not include bonuses was not based on objective facts); *cf. Eagle Transport Corp.*, 327 NLRB 1210 (1999) (posting letters from customers saying they would make other arrangements if the Company unionized did not violate the Act, because the letters conveyed an objective fact outside of the employer's control).

Predictions concerning the precise effects of unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel*, 395 U.S. at 618; *Systems West*, 342 NLRB 851, 852 (2004). In *Systems West*, a supervisor at a construction company told employees that if the company unionized, the employees would be unable to work jobs outside of a certain geographical area, because of union rules. The Board found, because the statement was both untrue and involved choices over which the employer would have either complete or partial control, the statement unlawfully threatened retaliation. Musk's statement here is similarly both untrue and involves a choice over which the employer would have control.

Contrary to Tesla's suggestion, *Noral Color Corp* and *TCI Cablevision of Washington* do not hold differently. In both of these cases, the employer stated that, if employees decertified the union, they would receive the 401(k) or Employee Stock Ownership Program already enjoyed by nonunion employees at the company. The Board found in both cases that the statement was an objective fact based on factors *outside* the Company's control. *See TCI Cablevision of Washington, Inc.*, 329 NLRB 700, 700-01 (1999) (employer's 401(k) plan, according to "the provisions of ERISA," must be offered to all employees at the company who were not represented by a collective-bargaining representative); *Noral Color Corp.*, 276 NLRB 567, 570 (1985) (denying participation in ESOP plan for nonunion employees "would have amounted to discrimination of another sort" and "might well have jeopardized the favorable tax benefits of the ESOP plan").

Finally, Tesla has failed to offer evidence that the Union does not value stock options as a form of compensation or would not negotiate to maintain them upon unionization. *Cf. Monfort, Inc. v. NLRB*, 1994 WL 121150, at *16 (10th Cir. 1994) (objective evidence established profit-sharing plan was not favored by the union); *NLRB v. Lenkurt Electrical Co.*, 438 F.2d 1102, 1107 (9th Cir. 1971) (employer's showing of past incidents of unionization creating difficulty in transferring employees demonstrated employer's prediction had a basis in objective fact). Instead, the only evidence Tesla provides for its groundless characterization of the UAW's position regarding employee stock options is the Company's own statements and inventions. This *ipse dixit* has no basis in reality.[11]

**6. The Method Used to Communicate the Threat Does Not Alter the Analysis**

While Musk used a social media platform to issue his unlawful threat of reprisal, that does not make this case unique. *See e.g.*, *Cayuga Medical Center*, 365 NLRB No. 170 (2017) (supervisor's statement on Facebook threatening retaliation against employee engaged in protected activity violated the Act); *Miklin Enterprises*, 361 NLRB 283, 290 (2014) (manager's posts on an anti-union Facebook site encouraged harassment of an employee who supported the union). Nor does the fact that the statement was issued on a public forum. *See Vemco, Inc.*, 304 NLRB 911, 925 (1991) (unlawful threat was communicated to employees through media coverage of a press release); *Operating Engineers Local 12 (Associated Engineers)*, 282 NLRB 1337, 1343 (1987) (statements by respondent's agents to the news media constituted threats in violation of Section 8(b)(1)(A) of the Act).

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[11] The remaining decisions Respondent cites in support of its position—*NLRB v. Pentre Electrical*, 998 F.2d 363 (6th Cir. 1993); *NLRB v. Village IX*, 723 F.2d 1360 (7th Cir. 1983), and *Benjamin Coal Co & Empire Coal Co.*, 294 NLRB 572, 581 (1989)—relate to the level of evidence necessary to substantiate an employer's predictions of the *economic* consequences of unionization. In these cases, the employers predicted their companies would become less competitive, potentially resulting in layoffs, a shutdown, or relocation, if wage and benefits increased as a result of unionization. No such statement occurred here. Predictions of the economic consequences of unionization are treated completely differently under *Gissel* and 8(c) than an employer's blunt statement that employees will lose a benefit if they unionize.

Further, it is irrelevant to whom an employer's statement is directed to or by whom it is intended to be heard when evaluating its coerciveness. *Crown Stationers*, 272 NLRB 164 (1984); *Corporate Interiors, Inc.*, 340 NLRB 732, 733 (2003). In *Crown Stationers*, the store manager unintentionally left an unsealed letter in a place where an employee was likely to find it; the letter contained a threat of discharge of a union supporter, and it was found and disseminated by an employee. The Board, reasoning that the fact "that the letter was personal and not intended for the eyes of employees is irrelevant," found the letter had a tendency to coerce employees in the exercise of their Section 7 rights and therefore violated Section 8(a)(1) of the Act. *See also Unbelievable, Inc.*, 323 NLRB 815, 816 (1997) (finding restaurant supervisor's coercive threat, overheard by a hidden busboy, violative of Section 8(a)(1) regardless of supervisor's lack of knowledge of busboy's presence); *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987) (finding company president's threats, overheard by a driver, unlawful regardless of president's intent or whether he was aware of driver's presence); *Corporate Interiors*, 340 NLRB at 733 (owner's threat of violence toward a union organizer during telephone call had a tendency to interfere with the free exercise of employee rights, whether or not owner was aware of employee's presence and whether or not he intended employee to hear the threat).

The General Counsel established that employee Michael Sanchez saw Musk's May 20, 2018 Twitter statement. (Tr. 52-53). Furthermore, the parties stipulated that Musk's May 20, 2018 Twitter statement was posted publicly and subsequently republished and disseminated and that Musk has used the same Twitter account to post about Tesla's personnel matters. (JX 4, ¶ 3, 15, 19). His statement was therefore visible to all employees in a location they had a strong interest in checking and monitoring.

Tesla's numerous other unfair labor practices in this case provide context and support for the conclusion that Musk's Tweet violated Section 8(a)(1). Indeed, a threat of loss of existing benefits is more coercive in the context of a union organizing campaign where, as here, the employer has already committed numerous other unfair labor practices. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980). Tesla's demonstrated disregard for the rights of its employees under

the National Labor Relations Act would reasonably make employees more sensitive to Musk's threat. Employees would have every reason to believe that Musk is willing to follow through on his threat in light of Tesla's previous conduct.

### 7. Neither Musk nor Tesla Has a First Amendment Right to Threaten Employees with Reprisals for Their Protected Activity

Tesla tries to support its defense of its threats to take away employees' stock options by claiming that holding it liable would violate it and Musk's First Amendment rights. Far from helping its case, this argument only serves to point up the weaknesses in it.

First of all, Tesla's First Amendment argument rests on a misrepresentation of what Board law provides and what the ALJ decided. As the ALJ found, Musk made a straightforward threat to take away employees' stock options if they unionized. (ALJD at 74) This goes far beyond mere misrepresentations and expressions of opinion; in fact, the ALJ specifically and correctly rejected Tesla's defense that Musk was merely speculating about what might happen if it engaged in collective bargaining with the UAW. On the contrary, Musk threatened unilateral withdrawal of these benefits if employees chose to unionize. (ALJD at 74)

The Supreme Court in *Gissel* went to some trouble to explain the difference between mere expressions of opinion and unlawful threats:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U. S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

395 U.S. at 618. Musk's statement that employees would lose their stock options was a threat—not merely a "potential" or "perceived" threat—in violation of Section 8(a)(1).

That makes Tesla's reliance on *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703 (9th Cir. 2010) self-defeating. This is shown most clearly by Tesla's clumsy attempt to make the decision in *Rodriguez* say something different than what it actually holds.

Tesla quotes the following passage from Rodriguez:

> . . , Kehowski's website and emails were pure speech; they were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot.

Tesla leaves out, however, is the sentence that follows:

> Their offensive quality was based entirely on their meaning, ***and not on any conduct or implicit threat of conduct that they contained***.

605 F.3d 710 (emphasis added). Kehowski may have been insulting the non-European students and employees at Maricopa County Community College, their families and non-Europeans in general, but he was not using his position as a math teacher to threaten any of them with reprisals; nor could his speech be interpreted as such. *Rodriguez* not only distinguishes itself, but shows why Tesla's argument is frivolous. Accord *Booth v. Pasco County*, 854 F.Supp.2d 1166, 1176 n.12 (M.D. Fla. 2012) (threats not protected speech, citing, inter alia, *Gissel* and *Rodriguez*).

Tesla also argues that Musk's threat to terminate employees' stock options if employees choose to unionize is entitled to First Amendment protection because he made it on Twitter, where millions of other persons, in addition to Tesla employees, would have seen it. This argument is wholly without merit as a Section 8(a)(1) defense, as argued above in part C(6) of this brief. It is also completely ineffective as a First Amendment claim.

Unlawful speech does not become lawful just because it is broadcast widely and heard by more than just those who are likely to be harmed by it. *Dixon v. International Brotherhood of*

*Police Officers*, 504 F.3d 73, 84 (1st Cir. 2007) (union president's televised statement that plaintiff was "in trouble" was implicit threat not protected by the First Amendment). If that were the rule, then employers could avoid liability under the Act by purchasing newspaper ads to make their unlawful threats, or putting them on billboards, or broadcasting them on Facebook. Tesla has not cited any authority for that dubious proposition.

### D. THE CHARGING PARTIES JOIN THE GENERAL COUNSEL'S ANSWERING BRIEF IN SUPPORT OF THE ALJ'S PROPOSED DECISION

The Charging Parties join and support the General Counsel's Answering Brief regarding three additional violations of Section 8(a)(1). ALJ Tracy correctly found that Respondent violated Section 8(a)(1) on May 24, 2017 when it interrogated Galescu and Ortiz about their protected activity of sharing OSHA Logs. (ALJD 27-32). The Judge also correctly found that Respondent violated Section 8(a)(1) on June 7, 2017 when Musk & Toledano made statements of futility in selecting the union, solicited complaints, and stated employees did not want a union. (ALJD 32-40). Finally, the proposed decision correctly finds that Respondent violated Section 8(a)(1) when it maintained an unlawful uniform policy. (ALJD 40-48).

## IV

## REMEDY

### A. THE ALJ CORRECTLY APPLIED THE BOARD'S STANDARD FOR NOTICE READINGS AND APPROPRIATELY ORDERED SUCH A READING

ALJ Tracy correctly ordered the Board's notice to be read aloud directly to employees, and in the presence of security guards, managers, and supervisors, at the Respondent's Fremont facility by a board official with CEO Musk present, or by Musk himself, at the Respondent's option. (ALJD 77-78). The ALJ explained that this remedy is necessary to "reassure employees that their employer and managers are bound by the Act's requirements." (ALJD 78). The ALJ further cited Respondent's "pervasive" misconduct," including violations by "numerous supervisors and agents, including its chief executive officer and chief people officer." *Id.*

The Board will require that a notice be read aloud to employees when the employer's unfair labor practices are "sufficiently serious and widespread." *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007) *enfd. mem.* 273 Fed. Appx. 32 (2d Cir. 2008); *North Memorial Health Care*, 364 NLRB No. 61, (2016); *Ingredion, Inc.,* 366 NLRB No. 74 (2018). The public reading of the notice is an "effective but moderate way to let in a warming wind of information and, more important, reassurance." *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)). The notice reading ensures employees "will fully perceive that the Respondent and its managers are bound by the requirements of the Act" and that the "important information set forth in the notice is disseminated to all employees, including those who do not consult the Respondent's bulletin boards." *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003). The reading helps "to dissipate as much as possible any lingering effect of the Respondent's serious and widespread unfair labor practices and enable employees to exercise their Section 7 rights free of coercion." *North Memorial Health Care*, 364 NLRB No. 61 (2016).

Respondent unconvincingly argues that a notice reading is not warranted here because the violations it committed were "isolated" and "generally minor." (Respondent's Brief at 73) This self-serving characterization has no basis in reality. Respondent has repeatedly demonstrated a blatant disregard for its workers' right to engage in protected activity. When workers attempted to wear union T-shirts, the Company implemented a uniform rule with sham justifications affecting 3,000 workers; when workers attempted to distribute union literature, the Company enforced a rule prohibiting the distribution of union literature by off-duty employees; when workers requested OSHA safety information, managers interrogated them. And when these acts proved insufficient to expunge the union movement at Tesla, the Company terminated and disciplined the most prominent union supporters because of their protected activities. Finally, CEO Musk, rather than disavow this misconduct or reassure workers, demonstrated that willful disregard for employees rights extends to the very top of the Company: he publicly threatened employees with the loss of benefits if they voted in favor of the union; informed union supporters

that it was futile to vote for a union; and sought to address union supporters' safety grievances only if they ceased their protected activity. Altogether, Judge Tracy's decision ordered Tesla to cease and desist from 10 separate acts of misconduct, three committed by the Company's own CEO, and others committed repeatedly. (ALJD 78-79) This misconduct, coupled with the timing of the violations during the Union's nascent organizing drive, demonstrate that Respondent's wrongdoing is "sufficiently serious and widespread" to warrant a notice reading with the Company's CEO present.

Contrary to Respondent's assertions, a notice reading to remedy the pervasive misconduct seen in this case is not unusual; it is the norm. In *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016), the employer discharged one employee because of union activities, prohibited the wearing of shirts with union insignias, interrogated an employee, engaged in surveillance of union activities, prohibited the posting of a union flyer, and imposed restrictions on union agents speaking with workers in the employers facility. The Board found a notice reading appropriate because of the nature of the violations, the timing of the violations near to planned picketing, and the involvement of upper management. In *Bozzuto's, Inc.*, 365 NLRB No. 146 (2017), the Board affirmed a notice reading where the employer disciplined and discharged two employees for engaging in protected concerted activity, interrogated employees, announced wage increases to dissuade employees from joining the union, and maintained a work rule prohibiting workers from discussing disciplinary actions. *Id.*

In *Advancepierre Foods, Inc.*, 366 NLRB No. 133 (2018), during a union organizing campaign, the employer maintained an unlawful no-solicitation policy, interrogated, surveilled, and disciplined four employees for engaging in protected union activity, interrogated an employee about engaging in the distribution of union authorization cards, and solicited employees to revoke their union. The Board stated a notice reading was appropriate because the violations were sufficiently serious, and some were plant-wide. Other recent, similar Board cases ordering a notice reading include *W.B. Mason Co.*, 365 NLRB No. 62 (2017); *Kalthia Group*

*Hotels, Inc*, 366 NLRB No. 118 (2018); *Ingredion, Inc. dba Penford Products Co*, 366 NLRB No. 74 (2018); and *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 (2018).

Tesla's reliance on *Ishikawa Gasket America*, 337 NLRB 175 (2001) is misplaced. In *Ishikawa*, the General Counsel excepted to the ALJ's failure to order the employer to read the notice directly to employees during worktime, and the Board denied this request. ALJ Tracy's order in this case does not require the employer to read the notice posting to its employees, instead allowing the employer the option of having a Board official read the notice, a significantly less onerous remedy. Further, in *Ishikawa*, the employer had already engaged in serious voluntary efforts to remedy its unlawful conduct, including terminating the supervisors and managers who had committed the Unfair Labor Practices. By contrast, the Board in *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019) emphasized the notice reading was necessary because the employer "continues to employ" the president who unlawfully threatened workers. The same circumstance exists in this proceeding.

Further, Respondent fails to cite any case law where the Board overturned an ALJ's proposed notice reading remedy. ALJ Tracy offered detailed and extensive explanations of Respondent's violations, and she concluded that such violations were sufficiently serious and widespread to warrant a notice reading with Respondent's top official present. In all the examples Respondent provides of the Board rejecting a notice reading, the General Counsel was excepting to an ALJ's rejection of a notice reading.

Finally, contrary to the Respondent's assertions, ordering a high-ranking official to publicly read the notice, or, at the Respondent's option, merely be present while the notice is read, is a proper remedy for the violations that occurred here. In *Bozzuto's*, discussed above, the Board ordered a Vice President, who had been directly involved in some of the violations, to read the notice, or be present while a Board agent read the notice. For employees who have witnessed the head of their company flagrantly violate the Act, requiring the top official's presence for the notice reading is the only remedy that can demonstrate to workers that the company must follow the law.

## V

## CONCLUSION

For all the reasons set forth above and in the General Counsel's Answering Brief, Charging Parties Michael Sanchez, Jonathan Galescu, Richard Ortiz, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO respectfully request that the National Labor Relations Board deny the exceptions made by Respondent Tesla, Inc.

DATED: February 13, 2020

SCHWARTZ, STEINSAPIR, DOHRMANN
& SOMMERS LLP
MARGO A. FEINBERG
DANIEL E. CURRY

By Margo A. Feinberg
MARGO A. FEINBERG
Attorneys for Charging Parties
MICHAEL SANCHEZ, JONATHAN GALESCU,
RICHARD ORTIZ, and INTERNATIONAL
UNION, UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, AFL-CIO

**PROOF OF SERVICE BY ELECTRONIC MAIL**

**Case No. 32-CA-197020 et al.**

EMILY A. HERO certifies as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5202. My electronic notification address is eah@ssdslaw.com.

On February 13, 2020, I caused the foregoing document(s) described as: **ANSWERING BRIEF OF CHARGING PARTIES MICHAEL SANCHEZ, JONATHAN GALESCU, RICHARD ORTIZ, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO** be served by electronic mail upon the person(s) shown below,

Edris W.I. Rodriguez-Ritchie, Esq.
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224
e-mail: edris.rodriguezritchie@nlrb.gov

Mark Ross, Esq.
Keahn Morris, Esq.
Sheppard, Mullin, Richter & Hampton LLP
4 Embarcadero Center, Suite 17
San Francisco, CA 94111-4158
e-mail: mross@sheppardmullin.com
e-mail: kmorris@sheppardmullin.com

__X__ **BY E-MAIL:** By transmitting a copy of the above-described document(s) via e-mail to the individual(s) set forth above at the e-mail addressed indicated.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 13, 2020, at Los Angeles, California.

EMILY A. HERO